In the Superior Court of New York.

IN THE MATTER OF THE CARGO OF THE GREAT REPUBLIC.

1. The true rule with regard to the right to contribution in the maritime law is the achievement of the object designed even for a short period of time by the sacrifice of the property; and this will be sufficient to give rise to and justify contribution, notwithstanding there may be a subsequent loss, provided the latter results from a new peril.
2. In a case where the following facts appeared—that the original or primary cause of the loss was an accident, not the subject of general average; that the proximate cause of the preservation of all that was saved was the scuttling of the ship; that the immediate cause of the scuttling was a fire between the lower decks of the vessel; that such fire was brought there by a burning spar which had been cut away by the voluntary act of the crew; that such act instead of averting the peril it was designed to prevent, was the real and efficient agent of the loss that followed: *Held*, first, that the direct damage to the cargo in the lower hold as well as that to the ship's knees and timbers by the scuttling, is a proper subject for contribution: Second, No damage to the cargo between decks and on fire, arising from the water thrown in is a proper subject for contribution.
3. Methods of computing and rules for contribution suggested.

The opinion of the court, in which the facts fully appear, was delivered by

HOFFMAN, J.—The complaint presents the following case:—That on the 6th of December, 1853, John B. Kitching shipped on board of the vessel called the Great Republic, then lying in the port of New York, six hundred tierces of mess beef, of the value of $15,900, to be carried in and aboard of such ship from the port of New York to Liverpool, there to be delivered.

That on the 26th of December, 1853, the ship took fire, and was so badly damaged and burnt, that she was rendered incapable of sailing, and the voyage was abandoned. That the beef was discharged from the ship, and delivered to the defendants, who, with the assent of all parties, became receivers of the cargo and ship, and of the proceeds of such parts as were proper to be sold—to pay over such proceeds to the parties who might be entitled.

That on the 1st of February, 1854, the defendants caused to be sold at public auction, five hundred and ninety-five of such six hundred tierces of beef, and about the 13th of February, collected the proceeds thereof, viz: the sum of $14,416 87; that they became

liable to pay such amount, and were requested to do so, after deducting their reasonable commissions of $360 42; which they had refused.

The answer of the defendants states:

That besides the beef of the plaintiffs shipped on board the vessel, there was a large cargo belonging to other persons, to be carried in like manner to Liverpool, according to the tenor of sundry bills of lading, excepting only the danger of the seas and fire. The breaking out of a fire in Front street, and its communication to the ship, is then stated, by which she and her cargo were put in imminent peril of destruction; and to preserve them, it became necessary to cut away the masts, which was done, and in doing which, other portions of the ship and the cargo, the said tierces of beef and other portions of the cargo laden on board, were saved and preserved; and hence that the plaintiffs became liable to contribute to the amount of such losses, damages and expenses, voluntarily incurred as aforesaid, in a general average. That the plaintiffs had agreed, that so much as they might be thus responsible for should be retained out of the proceeds of the sales of the beef. Such sales had been made by the defendants, as general agents of all parties by consent, and amounted to the sum of $14,056 45, after deducting their commissions; and that the amount for which the defendants were liable, upon such general average, was the sum of $11,841 70, leaving a net balance due of $2,214 75, which the defendants offered to pay.

The cause was tried before the Chief Justice and a jury, in March, 1855. A verdict was taken, by consent, in favor of the plaintiffs, for the sum of $14,056 45 damages, and $1,500 for interest, subject to the opinion of the court, at general term, on the questions of law arising upon the statement and adjustment of general average; and subject also to adjustment of the amount of the said verdict by the court, and with liberty to either party to turn the case into a bill of exceptions."

1st. About midnight, of the 26th of December, 1853, the ship was lying at the foot of Dover street, with nearly all her cargo on board, and her sails bent below her royals. A fire broke out in Front street, nearly in a line with the ship, as the wind was then

blowing. The watchman awoke the second mate, with information of the fire and that coals were falling about the ship. All hands were called and stationed. Men were sent into the fore, main, and mizzen-tops with buckets.

The foresail soon burst into a flame. Attempts to beat out the fire in it failed, and the men stationed in the fore-top were driven out of it. The mizzen-top-sail and the mizzen-top-gallant-sail had then taken fire. The crew attempted to extinguish this, and to cut the sails adrift from the yards. These efforts were in vain—the dry cotton canvas soon being a sheet of flame. The firemen had, about this time, arrived with their engines; but would not work on board, or near the ship, for fear of the blocks and other articles, on fire aloft, falling on them. It was then concluded, for the preservation of the ship and cargo, to cut away the masts.

Here, we may notice, was the first determination to do an act of destruction, to contribute to the general safety.

At that time, the sails, spars and rigging at, and the heads of the lower masts were on fire. No material damage had been done to the spars by fire.

In executing this determination, the forestay, and foretop-mast stay were first cut away, and fell over the starboard rail into the dock. The foretop-mast broke short off, and fell down endwise, through three decks, being on fire at the time, and (as hereafter particularly noticed) set the cargo and the lower part of the vessel on fire. The mainmast was next cut away; and, in falling, crushed the boats, rails, &c., on the starboard side, and the houses on deck, broke the steam engine, and did other damage. The houses, &c., on the upper deck, were all more or less on fire at the time.

After the masts, spars, &c., were cut away, the firemen came on board with their hose, and finally succeeded in putting out the fire on the deck; and it was supposed that the ship and cargo were saved. But all the houses, companionways on, and the upper deck, rails, &c., abaft the mainmast, were destroyed, or very badly burned. The cabin in the upper between-decks, with all its furniture, the stem of the ship, rudder heads, stores, spare sails, and a quantity of bread in the upper between-decks, also perished.

It is also found that the masts, spars, &c., cut away were nearly destroyed by fire, *after* they fell on deck.

The fire on and about the upper deck being extinguished, several streams (of the engines) were removed to another fire which had broken out in the city. After this it was discovered that the cargo was on fire in the lower between-decks, caused by the foretop-mast falling through the decks, being on fire at the time.

This unfortunate result brings us to the consideration of the facts attending the second period of the accident; and it is necessary to understand these facts and circumstances, with regard to two points of the case:

First.—Whether they displace the apparent right to a contribution for the masts, &c., cut away, assuming such a right to have existed.

Next (and of far more importance), Whether they give a foundation to the claim for contribution for nearly two-thirds of the original value of the ship, and for about one-half of the cargo as well as for the freight.

And this last question is to be examined also, in connection with all the facts from the commencement to the end of the disaster.

It is found that after the fire on and about the upper deck had been extinguished, and several streams had been removed to attend another fire in the city, it was discovered, that the ship and her cargo were on fire in the lower between-decks, caused by the top-mast falling down through the decks, (it being on fire at the time,) and thus setting the cargo and the ship in the lower between-decks on fire. When discovered, it had such headway that all attempts to extinguish it from above were soon found to be fruitless; and the ship was, therefore, scuttled in three separate places, and soon sunk down ten feet, when she struck the bottom. Every effort to put out the fire was ineffectual, and the ship burned for two days, when, being burned to the water's edge from aft to about the foremast, it was extinguished. The cargo was burned badly in the second and third between-decks; but that in the lower hold was only damaged by water.

Up to the time of cutting the masts away, the cargo had sus-

tained no damage by either fire or water; nor was it damaged by the water thrown in or on the ship to extinguish the flames on the upper and in the upper between-decks; and not until the fire was discovered below, caused by the falling of the foretop-mast through the decks, did it sustain any damage, by either fire or water.

The grain in the lower hold had swelled so as to break the knees and beams of the lower deck, and otherwise badly strain and injure the ship.

The vessel was afterwards floated, the cargo taken out, and the ship condemned and sold.

I. The first question is as to the effect of these events upon the right to contribution for the masts, &c. cut away, supposing it to have been otherwise due.

I consider the true rule to be, that the achievement of the object designed, even for a very short period of time, will be sufficient to justify contribution, notwithstanding a subsequent loss, provided the ultimate loss results from a new peril.

II. I come next to the consideration of that important part of the cause which relates to the almost total destruction of the vessel, and of about half the cargo, for which contribution is sought.

The general features of this interesting part of the case are these: That the original or primary cause of the loss was an accident, not the subject of general average; that a proximate cause of the preservation of the hull and cargo was the scuttling of the ship; that the immediate cause of the scuttling was a fire in the hold and between the lower decks of the vessel; that such fire was brought there by a voluntary act of destruction; and that such voluntary act, instead of averting the peril it was intended to prevent, was an actual and efficient agent of the loss that ensued. The primary and accidental cause of the disaster was transferred from one part of the ship to the other. It became a continuation of that original cause; a transmission of it, in its full and unremitted character, to the vessel and cargo.

Had no measures been taken to arrest the flames, the vessel and cargo would have been destroyed. Had the scuttling not taken place, the same identical results would have ensued; and ensued,

not merely in spite of the voluntary act, but as its direct and immediate consequence. Had the vessel been left unscuttled, a heavy gale of wind, and dash of the waves might have preserved some portions of her hull and of the cargo. Would it have been possible to sustain a claim for contribution under such circumstances?

There are cases where contribution has been compelled for services honestly made, although a severe injury might have left it questionable whether they were essential to the preservation which ensued. But to award contribution for a voluntary act which directly led to the destruction, or which, at least, did not for a moment interrupt the progress of the original cause of the disaster—and when that cause was fortuitous—seems unsanctioned by principle or authority.

With such exceptions, I apprehend the pervading principle of contribution is such as I have stated. There must be the intent to sacrifice the thing designated. The sacrifice must be accomplished. Some definite advantage must have sprung from it. A final preservation must ensue, not indeed by a logical necessity, directly and solely from the sacrifice, but as reasonably contributed to by it, or as consistent with it, as with any hypothesis the circumstances will allow.

If such is the ruling principle to be found in the law upon this subject, the present case, in the view now considered, cannot admit of doubt. The destruction contemplated was of the masts and spars, and the ordinary consequential damage. The vessel and each part of the cargo was meant to be saved, not sacrificed. What was designedly given up was uselessly destroyed or surrendered, and what it was meant to preserve was destroyed by the very act of sacrifice.

We are brought, then, to the consideration of the next material act of the agency of man in this catastrophe, viz., the effect of the scuttling. It will be remembered that the ship, when scuttled, sank down ten feet, when she struck the bottom.

What, then, was the effect of the scuttling? Let it be conceded that all that was preserved of cargo or vessel, was saved by this act. Let the utmost force be yielded to the argument of counsel, that, as the vessel was lightened by the progress of the fire, she would have

gradually risen to meet, as it were, the fatal embrace of the flames. She would then have burnt lower, and for a considerable part of the ten feet, which by the scuttling was submerged. And thus, the ten feet of frame, and the principal portion of the cargo rescued, owed their safety to this deed.

Still the important and decisive question remains: What part of the ship was destroyed by the scuttling? It is indispensable, in conformity with the principles before stated, that such destruction should be directly traced to the scuttling, and an appreciation of it be possible.

The flames continued for two days, and burnt the vessel to the water's edge, from aft to near the foremast; and no part of the damage can, upon the finding, be attributed to the scuttling, except the breaking of the knees and beams of the lower deck, and the strain and injury arising from the swelling of the grain in the lower hold.

And as to the cargo, that in the lower hold was only damaged by the water. All the rest was chiefly, if not solely, injured by the fire.

The question appears to be reduced to this:—Shall the amount of injury to the ship, and damage to the cargo, which can be definitely traced to the scuttling, be brought into the general average?

We apprehend that this decision may best be placed upon a settled rule of law, that no contribution can be claimed for a loss of cargo which is damaged by its own proper vice.

Mr. Benecke (Benecke on Average, p. 132, Boston edition, 1853) says—an injury ascribable to the quality of the goods ought never to prejudice the rest of the shippers, or the ship-owners.

In the Dictionaire de Droit Commercial of Grousset & Meiger, (Paris, 1852, vol. 1, p. 532, Astor Library,) it is stated, that if the loss results from the proper vice of the article, the owner must bear the consequences. Delaborde, p. 40, is cited for the proposition. Roccus states the same rule. (Ingersoll's Translation, 83.) And Boulay Paty, in his edition of Emerigon, (Paris, 1827, Astor Library,) declares also, that a loss arising from the proper vice of the cargo, is matter of simple average, (§ 433.)

The two articles of the Code of Commerce seem explicit to this point. The like rule was applied in the case of *Bond* vs. *The Superb*, Wallace, Jr., Rep. 355.

But the present case is different. The fire was fortuitous. We may treat it precisely as if it had originated by accident in the between-decks. The scuttling necessarily brought a direct and immediate damage to the cargo in the lower hold—the grain, it is presumed. It brought it intentionally. It was certainly to be anticipated that a damage to that article of the cargo would result. It preserved, in a damaged state, a part of that article, and it preserved whatever of the residue of the cargo was saved, and that relic of the vessel which was raised.

Mr. Benecke (page 165) says:—"If sacrifices be made in order to extinguish the fire, (occasioned by lightning, intrinsic quality, or other accidental causes,) if masts or cables, for example, be cut away, or the vessel be run ashore, I am of opinion that the damage ought to be general average, although an instance of a decision to the contrary is quoted by Emerigon."

He proceeds:—"If water be thrown down the hatches to stop the progress of an accidental fire in the hold, or between-decks, saving the articles which had already caught fire from utter destruction, and of extricating the vessel and rest of the cargo from an imminent danger, the effect of the water upon the former goods is, therefore, particular average. It is not an injury, but a real advantage to them. But the damage done by the water is, I conceive, of the nature of a general average."

It appears to us that the direct damage done to the cargo in the lower hold, by the scuttling, is a proper subject for contribution. We presume it can be arrived at by a comparison of the invoices of the grain there stowed, and the proceeds of the sales of such grain. No damage to the articles of the cargo which were between decks, and on fire, arising from the water thrown in, is to be contributed for. The fire is to be still considered as an accidental fire. And we think that the damage to the knees and timbers, resulting ing from the swelling of the grain in the lower hold, which directly sprung from the scuttling, is to be allowed. What would it have

cost to repair that specific injury? This we suppose the adjusters can without difficulty ascertain, and with reasonable precision.

III. It is next necessary to state what rules of valuation are applicable to the subjects which are to be allowed for, and those which are to contribute.

1st. The amount to be allowed for the ship is that sum which the adjusters shall be able to say arose definitely from the injury to the knees and beams of the lower deck, and the strain to the ship produced by the swelling of the grain in the lower hold.

The ship is to contribute upon the proceeds of the sales of her hull and materials, to which is to be added that amount which the adjusters shall ascertain ought to be allowed for injury to the knees, &c., as above stated. *Dodge* vs. *The United Insurance Co.* 17 Mass. 475; 2 Phillips on Ins. 137, 4th edition, Pardessus, art. 748.

2. The damage to the cargo to be allowed for, is to be ascertained by a comparison of the proceeds of the sales with the invoice costs.

The ordinary rule in a case of jettison is to take the value at the port of destination, and to allow that value, as well as to fix the amount of contribution upon the same basis for what is saved. 2 Phillips, 4th ed., p. 132. Where sales of damaged goods have been made, the difference between the sales and the valuation, if sound, is the amount to be allowed. If goods are sold at the place to which the apportionment relates, the amount of the proceeds is the basis on which their contributory value is fixed (2 Phillips, 151, ed. 1854); and goods are contributed for at the same rate and on the same basis as goods contribute. Ibid, p. 132.

In a case like the present, where the voyage has not commenced, and the goods were recently shipped, their value may properly be tested by the invoices; and the sales of the goods at the same port of shipment may be taken as evidence of their value after the disaster. The difference is the damage to be allowed.

3. The next question is, on what basis is the residue of the cargo

to contribute? The ordinary rule is, that in cases of jettison, the cargo is to contribute upon the value of the goods estimated at their prime cost, or original value; or if the vessel has arrived at her port of destination, at their value at such port. *Rogers* vs. *The Mechanics' Insurance Co.*, 2 Story's Rep. 173.

Mr. Abbott states, (347,) that if the ship, in consequence of any misfortune to be sustained by general average, be compelled to return to its loading port, and the average be immediately adjusted, in that case the goods only contribute according to the invoice prices, for the price of the sale is unknown.

In *The Mutual Insurance Company* vs. *The Cargo of the George*, 8 Law Rep. 361, the ship was stranded, and unable to return to the port of departure, or to adopt an intermediate port. The vessel was lost, and a greater part of the cargo saved.

The cargo was adjudged to contribute at the prices stated in the invoices and bills of lading, deducting therefrom salvage and other necessary expenses incurred in consequence of the wreck.

But in these instances the value of the cargo, as *preserved*, was to be arrived at—it being a fixed rule, that a subject is to pay according to its value as it exists when called on to contribute. But in the present case, all the cargo was, to some extent, injured. All that was preserved was sold. The prices may be taken as a fair test of the value of what was saved.

We may add that, in the present case, the consent of all the parties interested to a sale of all the cargo, renders this mode of adjusting the basis of contribution proper, even if another would, in ordinary cases, be more regular.

IV. In this connection another question arises. It is a general rule, that the goods or articles sacrificed and allowed for, are made to contribute in common with those saved.

If merchandise is thrown overboard worth $1,000, and the residue of the cargo, and the vessel, valued at $10,000, it is plain that if the owners of the latter pay the whole $1,000, the owner of the goods jettisoned loses nothing. It is, however, a fundamental principle that he is to be dealt with precisely as if the goods of another

had been sacrificed. Hence, he pays with the others; and the contributory interests in the case stated are $11,000, instead of $10,000, or 9.09 per cent., instead of 10 per cent.

In the present instance, on the assumption that only the grain in the lower hold was damaged by the scuttling, and therefore the subject of a general average, the loss was $45,409 38.

The owners of this grain pay, of course, their proportionate amount of the proceeds of the sales of what was saved. But if they pay nothing upon the amount contributed to them, they would receive from others the whole $45,409 38, and get, in other words, the whole value of the goods thus lost to them. They should pay the same percentage on what they get as the owners of the other portions of the cargo pay upon what they receive.

We therefore add to the value of the cargo which is to contribute, the amount of the loss which is to be paid to the owners of that part of the cargo allowed for.

V. The next question is, whether the freight should be contributed for. The voyage was broken up. The voyage cannot be said, indeed, to have commenced. The contracts of affreightment were at an end. Not a dollar of freight had been earned. How can it be treated as sacrificed? The ship is not allowed for. Its accessory, the freight, cannot be.

When freight was allowed in *The Columbian Insurance Co.* vs. *Ashley*, 13 Peters, 364, it was because the ship was allowed for. It was lost, as well as the ship, by the sacrifice for the common good. And when freight *pro rata itineris* (that is, the freight which had been earned at the time of the disaster) was allowed in *Gray* vs. *Walker*, 2 Serg. & Rawle, 229, the ship was also a subject of general average.

To allow freight in this case would be, in effect, to make contributors in general average insurers of the freight.

It follows, in this case, that if freight is not to be allowed for, it is not to contribute.

The result is, that the adjustment must be revised upon the principles stated.